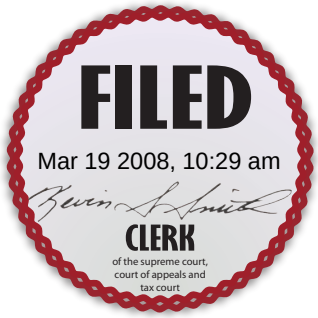


ATTORNEY FOR APPELLANT:

**WALTER R. HAGEDORN, II**
Tell City, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**
Attorney General of Indiana

**SCOTT L. BARNHART**
Deputy Attorney General
Indianapolis, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

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| DAVID L. SCHNEIDER, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 62A01-0708-CR-392 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE PERRY CIRCUIT COURT
The Honorable Lucy Goffinet, Judge
Cause No. 62C01-0603-FC-209

**March 19, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## Case Summary

David Schneider appeals his conviction for Class C felony operating a motor vehicle after forfeiture of license for life ("operating after forfeiture"). We affirm.

## Issues

Schneider raises four issues, which we restate as:

I. whether the trial court properly admitted evidence of his alcohol consumption and intoxication;

II. whether there is sufficient evidence to support his conviction;

III. whether he received ineffective assistance of counsel; and

IV. whether a discrepancy between the charging information and the verdict form is reversible error.

## Facts

The evidence most favorable to the conviction indicates that late on February 24, 2006, Schneider was showing his twelve-year-old daughter where he used to go sledding on Flannagan's Hill in Tell City. Schneider was driving and his car got stuck in the mud. Schneider and his daughter sought help from Brian Sims, who was working on a tractor nearby. Even with Sims's assistance, Schneider could not get the car out of the mud. Sims returned home and suggested that his mother call the police to "find out what's really goin on here." Tr. p. 101. Schneider then called a tow truck for assistance. The police arrived in the area at the same time as the tow truck carrying Schneider and his ex-wife, Mary. The car was eventually freed and Schneider was arrested.

On February 27, 2006, the State charged Schneider with Class C felony operating after forfeiture. Prior to trial, Schneider filed several motions in limine. The State did not object to most of Schneider's motions and the trial court granted them. However, the State objected to Schneider's motion in limine regarding evidence of his intoxication. The trial court allowed "evidence if it comes in as probative evidence and not to the Defendant's character." App. p. 6. Also prior to trial, Schneider stipulated that he "was an habitual traffic violator with his driving privileges forfeited for life" and that he "knew his driving privileges were forfeited for life." Tr. pp. 90-91. During trial, Schneider further stipulated, "if the defendant is convicted he waives any argument that the Court cannot consider his certified driving record during his sentencing because the jury did not consider the same." Id. at 154. A jury found Schneider guilty as charged. He now appeals.

## Analysis

### *I. Evidence of Intoxication*

Schneider argues that the trial court improperly denied his motion in limine and admitted evidence of Schneider's alcohol consumption and intoxication at trial. Schneider contends that because he was not charged with any alcohol related offenses, this evidence was irrelevant, highly prejudicial, and inadmissible character evidence. Generally, the trial court has inherent discretionary power on the admission of evidence, and its decisions are reviewed only for an abuse of that discretion. Jones v. State, 780 N.E.2d 373, 376 (Ind. 2002).

We again clarify that pre-trial rulings on admissibility do not determine the ultimate admissibility of the evidence. Hightower v. State, 866 N.E.2d 356, 364 (Ind. Ct. App. 2007), trans. denied. Accordingly, a trial court's ruling on a motion in limine does not constitute an appealable issue. Id. Only after the evidence is admitted at trial over a specific objection can a party assert an error on appeal. Id. Thus, the question on appeal is two-fold: (1) did Schneider specifically object so as to preserve the issue on appeal, and (2) if so, did the trial court err in admitting certain evidence. See id.

Based on Indiana Evidence Rule 404(b), Schneider's attorney objected to three references to Schneider's alcohol consumption and intoxication at trial.[1] The first objection was during Sims's testimony in which he stated, "We was just talking and asked if he had been drinking." Tr. p. 102. Sims stated that Schneider admitted that "he had been drinking a little bit." Id. at 103. Other evidence that defense counsel objected to included the testimony of Tell City Police Officer, Marty Haughee, who stated, "Upon speaking with Mr. Schneider I detected a strong odor of an alcohol beverage on or about his person. I noticed his eyes to be red and watery and his balance to be unstable." Id. at 116. Defense counsel also objected to Exhibits 5 and 6, which were photographs of what appears to be a bottle in a brown paper bag on the ground near the car. The content of the bottle is not identifiable.

Indiana Evidence Rule 404(b) provides in part:

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[1] Schneider also argues that defense counsel's failure to object to all of the alcohol-related evidence resulted in ineffective assistance of counsel. We address this argument later.

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

This rule prevents the State from punishing people for their character. Bassett v. State, 795 N.E.2d 1050, 1053 (Ind. 2003). The admission of extrinsic evidence of offenses poses the danger that the jury will convict the defendant because of his or her bad character or his or her tendency to commit other crimes. Id.

> To decide whether character evidence is admissible under Rule 404(b), the trial court must: (1) determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the person's propensity to engage in a wrongful act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Ind. Evidence Rule 403.

Id.

Here, the State argues, unconvincingly, that the evidence related to Schneider's drinking was properly admitted to show his identity as the driver. The State asserts, "Schneider not only admitted he had been drinking, but admitted that he had been drinking in the area near the vehicle when the officers found a beer bottle nearby[.]" Appellee's Br. p. 7. Although that may be the case, it is undisputed that at some point in the evening Schneider was in the vicinity of the car. The alcohol-related evidence does not make it more or less probable that Schneider was driving the car. See Evid. R. 401. Thus, it is not relevant to the identity of the driver of car, and the trial court abused its discretion in admitting this evidence.

Nevertheless, "[e]rrors in the admission of evidence will not result in reversal if the error is harmless, i.e., if the probable impact of the evidence upon the jury is sufficiently minor so as to not affect a party's substantial rights." Cox v. State, 854 N.E.2d 1187, 1197 (Ind. Ct. App. 2006). The only issue before the jury was whether Schneider was operating a motor vehicle. Both Sims and the tow truck driver testified that Schneider told them that he had been driving the car. In fact, Sims specified that Schneider told him he was showing his twelve-year-old driver where he used to go sledding. Further, the keys to the car were in Schneider's pants pocket. Finally, even though his daughter's trial testimony was that they walked from their house to pick up the car in the remote location, there is no evidence as to how the car got there. Given all of the evidence that Schneider had driven the car, any error in the admission of the alcohol-related evidence is harmless.

### *II. Sufficiency of the Evidence*

Schneider argues that the circumstantial evidence that he drove is insufficient to support his conviction. Upon a challenge to the sufficiency of evidence to support a conviction, we do not reweigh the evidence or judge the credibility of the witnesses, and we respect the jury's exclusive province to weigh conflicting evidence. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We must consider only the probative evidence and reasonable inferences supporting the verdict. Id. If the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt, we must affirm the conviction. Id.

Further, circumstantial evidence alone may be sufficient to support a conviction. Hubbard v. State, 749 N.E.2d 1156, 1158 (Ind. 2001). "'If a reasonable inference can be drawn from the circumstantial evidence, the verdict will not be disturbed.'" Id. (citation omitted).

The only issue for the jury at trial was whether Schneider had operated the car. Without any explanation as to how the car got stuck in the mud, Schneider's daughter testified that he had not driven the car. This was contrary to Sims's and the tow truck driver's testimony, both of whom testified that Schneider said he had been driving the car. This discrepancy was an issue for the jury. We will not reweigh the evidence or assess witness credibility. The evidence is sufficient to establish that Schneider had operated the car.

### *III. Ineffective Assistance of Counsel*

Schneider makes several claims that he received ineffective assistance of counsel. To establish a claim of effective assistance of counsel, a defendant must establish the two components set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Overstreet v. State, 877 N.E.2d 144, 151-52 (Ind. 2007). "First, a defendant must show that counsel's performance was deficient." Id. at 152. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that counsel made errors so serious that counsel was not functioning as guaranteed to the defendant by the Sixth Amendment. Id. "Second, a defendant must show that the deficient performance prejudiced the defense." Id. This requires a defendant to show that counsel's errors were so serious as to deprive the defendant of a fair trial, meaning a

trial whose result is reliable. Id. "To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. "Further, counsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption." Id.

Schneider first argues that defense counsel was ineffective for failing to object when the State recalled Officer Haughee, who observed Schneider's daughter's testimony, to impeach her testimony. Schneider argues that defense counsel should have objected because this testimony violated the separation of witnesses order. However, Schneider's bare assertion that if counsel had objected, the objection would have been sustained and Schneider's daughter would not have been impeached, is not enough to show that counsel's performance was ineffective. See Grinstead v. State, 845 N.E.2d 1027, 1036 (Ind. 2006) ("The purpose of an ineffective assistance of counsel claim is not to critique counsel's performance, and isolated omissions or errors and bad tactics do not necessarily mean that representation was ineffective."). This is especially true when considering that the trial court overruled defense counsel's hearsay objection to Officer Haughee's impeachment testimony. The failure to object on separation of witness grounds could have been a tactical decision by trial counsel—a decision we will not second-guess.

This is also the case regarding Schneider's claim that defense counsel should have cross-examined the Department of Child Services case manager who interviewed

Schneider's daughter on the night of the incident. Although Schneider claims that defense counsel should have discredited the case manager through cross-examination, he does not establish what information would have been obtained through cross-examination to discredit the case manager. This unsupported assertion is not enough to establish ineffective assistance of counsel.

Schneider also argues that defense counsel was ineffective for failing to object to all references to the alcohol-related evidence. Again, it may have been a strategic decision of defense counsel not to continue to object to the evidence after the motion in limine was denied and the three objections at trial were overruled. Nevertheless, Schneider cannot show that the alleged error prejudiced him. As we have already discussed, the issue at trial was whether Schneider was operating a motor vehicle. Two witnesses testified that Schneider told them he had been driving. Defense counsel's failure to object to the alcohol-related evidence did not prejudice Schneider as to the issue of the identity of the driver.

Schneider claims that defense counsel should have requested an admonishment or moved for a mistrial when Schneider's daughter was asked what was the next thing she remembered about the evening and she answered, "I remember that [case manager] waking me up and she asked me if my dad touched me." Tr. p. 189. Defense counsel immediately objected and the trial court sustained the objection. Even if defense counsel had moved for an admonishment or requested a mistrial, Schneider does not show that such requests would have been granted by the trial court. In fact, in his brief, Schneider only asserts, without citation to authority, that the trial court "likely" would have granted

the request. Appellant's Br. p. 21. What is clear, however, is that further action by defense counsel would have drawn more attention to Schneider's daughter's testimony. It could have been a strategic decision by defense counsel not to exacerbate the testimony.

Schneider also contends that defense counsel should have objected to a hearsay statement regarding whether the car had been stolen and to evidence and argument indicating that the car was located beyond a posted no trespassing sign. Again, Schneider asks us to critique defense counsel's performance based on bald assertions of error. This we will not do. It was within trial counsel's prerogative not to draw attention to these statements.

Schneider also appears to argue that defense counsel's "collective performance" fell below an objective standard of reasonableness. Appellant's Br. p. 24. "Certainly, the cumulative effect of a number of errors can render counsel's performance ineffective." See Grinstead, 845 N.E.2d at 1036. Here, however, the only issue was whether Schneider was driving the car. When considering the evidence and the limited issue before the jury, we cannot conclude that the cumulative effect of the alleged errors was so serious that counsel was not functioning as guaranteed to the defendant by the Sixth Amendment. See Overstreet, 877 N.E.2d 151-52 (Ind. 2007).

Finally, Schneider argues that defense counsel should not have stipulated, "that if the defendant is convicted he waives any argument that the Court cannot consider his certified driving record during his sentencing because the jury did not consider the same." Tr. p. 154. At the sentencing hearing, the trial court stated, "I find that the fact

that your prior criminal history, your previous convictions and sentences to DOC for the exact same charge are aggravating in this case." Tr. p. 256. The trial court sentenced Schneider to six years.

Taken it face value, it is at least possible that this stipulation had more to do with judicial fact finding of aggravating circumstances as prohibited by Blakley v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), than with waiving a claim of error regarding the trial court's consideration of an aggravating circumstance. Nevertheless, Schneider has not established ineffective assistance of counsel regarding the stipulation as it relates to his sentence.

First, there is no indication that the trial court relied on Schneider's certified driving record when it sentenced him. Instead, the State offered a printout from the Department of Correction containing "Offender Data." Exhibit 1. The printout shows previous convictions for Class D felony driving while intoxicated, Class D felony operating a vehicle while intoxicated with a previous conviction, and two convictions for Class C felony operating a motor vehicle after a lifetime suspension.

Second, Schneider has not established that the trial court was prohibited from considering the two prior convictions for the same offense as aggravating because they were not essential elements of this offense.[2] It is the lifetime forfeiture that is an essential element of the offense, not the driving record, which is only evidence of the

[2] Operating while forfeited is defined as "A person who operates a motor vehicle after the person's driving privileges are forfeited for life under section 16 of this chapter, IC 9- 4-13-14 (repealed April 1, 1984), or IC 9-12-3-1 (repealed July 1, 1991) commits a Class C felony." Ind. Code § 9-30-10-17.

forfeiture. Neither the driving record in and of itself, nor the past convictions are essential elements of the offense.

Third, regardless of the alleged error, Schneider's criminal history supports the six-year sentence imposed by the trial court. Schneider has an extensive juvenile history. He also has convictions for operating while intoxicated in Georgia and Michigan. Not including the offenses contained in the printout, Schneider has driving-related convictions for Class D felony operating as an habitual traffic violator in 1991, Class D felony operating while intoxicated in 1993, and Class C felony operating a motor vehicle after forfeiture of license for life in 2002. Schneider also has numerous other misdemeanor convictions. Thus, Schneider has not established that he was prejudiced by the stipulation. Defense counsel's stipulation did not amount to ineffective assistance of counsel.

### *IV. Defective Verdict*

Schneider also argues that the discrepancy between the charging information and verdict form is reversible error. Schneider was charged with operating a motor vehicle after his driving privileges were "forfeited" for life pursuant to Indiana Code Section 9-30-10-17. App. p. 13. Schneider stipulated that his license was forfeited for life and that he knew of the forfeiture. The only issue at trial was whether Schneider was operating a motor vehicle. The verdict returned by the jury stated, "We, the jury, find the Defendant guilty of operating a motor vehicle when driving privileges have been revoked for life, a Class C felony." Id. at 67 (emphasis added). The judgment of conviction also states that Schneider's driving privileges had been "revoked" for life. Id. at 68.

Schneider argues, without citation to authority, that the discrepancy between "forfeited" and "revoked" is substantive and reversal is required because there is no evidence that his driving privileges were revoked for life. We disagree.

As the State points out, this issue is waived because Schneider did not raise it when the verdict was returned. As our supreme court has stated, "If the appellant felt the verdict of the jury was not in proper form, he may not stand idly by and make no objections thereto and permit the jury to be discharged, and then, after the jury has separated finally and it is too late to correct or amend the verdict, attack the verdict as defective." Smith v. State, 247 Ind. 126, 130, 211 N.E.2d 186, 189 (1965). "One may not fail to make objections during the trial at the proper time when the alleged error is revealed, and later, after it is too late to remedy such alleged error, predicate error thereon." Id. This issue is waived.

Waiver notwithstanding, the alleged error is one of semantics, not substance. Whether Schneider's license was forfeited for life or revoked for life is essentially one and the same. Moreover, the only issue before the jury was whether Schneider operated a motor vehicle, not whether his license was forfeited or revoked. This discrepancy does not amount to reversible error.

**Conclusion**

The error in the admission of the alcohol-related evidence was harmless, there is sufficient evidence to support Schneider's conviction, he did not receive ineffective assistance of counsel, and the discrepancy in the verdict is not reversible. We affirm.

Affirmed.

SHARPNACK, J., concurs.

VAIDIK, J., concurs in result with opinion.

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# IN THE
# COURT OF APPEALS OF INDIANA

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| DAVID L. SCHNEIDER, | ) | |
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| Appellant-Defendant, | ) | |
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| vs. | ) | No. 62A01-0708-CR-392 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |
| | ) | |

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**VAIDIK, Judge, concurring in result.**

I respectfully disagree with the majority's conclusion that the trial court abused its discretion in admitting evidence of Schneider's alcohol consumption and intoxication at trial. Because the majority finds that the admission of this evidence was harmless, I concur in result.

Indiana Evidence Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof

of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." Rule 404(b) "serves to prohibit a jury from making the 'forbidden inference' that because of a defendant's criminal propensity, he committed the charged act." *Burnside v. State*, 858 N.E.2d 232, 242 (Ind. Ct. App. 2006) (quoting *Bald v. State*, 766 N.E.2d 1170, 1173 (Ind. 2002)). However, Rule 404(b) does not bar evidence of uncharged criminal acts that are "intrinsic" to the charged offense. *Id.* (citing *Lee v. State*, 689 N.E.2d 435, 439 (Ind. 1997), *reh'g denied*). Other acts are "intrinsic" if they occur at the same time and under the same circumstances as the crimes charged. *Holden v. State*, 815 N.E.2d 1049, 1054 (Ind. Ct. App. 2004), *trans. denied*. "Evidence of happenings near in time and place that complete the story of the crime is admissible even if it tends to establish the commission of other crimes not included among those being prosecuted." *Wages v. State*, 863 N.E.2d 408, 411 (Ind. Ct. App. 2007) (quotation omitted), *reh'g denied*, *trans. denied*.

Here, the fact that Schneider was intoxicated when driving the car is intrinsic to the offense for which Schneider was being tried, operating a motor vehicle after forfeiture of license for life. It occurred at the same time, at the same place, and under the same circumstances. It was, in fact, the very circumstance under which Schneider was driving. In addition, the evidence is relevant to show that Schneider was driving the car. That is, the fact that Schneider was intoxicated makes it more likely that he would attempt to drive his car up a hill and get stuck in the mud. I would therefore hold that the trial court did not abuse its discretion in admitting this evidence at trial.